NO. 22460

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEROY HERBERT RAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

ERIC A. NOBLES
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2475 688-2434

Attorneys for Appellee
United States of America

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Attorneys for Appellee
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I

STATEMENT OF PROCEEDINGS

On June 28, 1967, the Federal Grand Jury for the Central District of California returned an eight-count indictment naming appellant JAMES LEROY RAY and seven co-defendants. All were named as defendants in Count One charging a conspiracy to steal mail from authorized depositories, and to use the information secured from the mails to make fraudulent withdrawals from depositors' accounts. 1/ [C.T. 2-11.]

On November 7, 1967, a jury trial commenced before the Honorable Peirson M. Hall, United States District Judge, in which

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1/ C.T. refers to Clerk's Transcript.

Leroy Herbert Ray was tried along with defendants James Hollyfield and Vincent Stafford Hill.

On November 16, 1967, the jury returned a verdict of guilty as to all defendants on all counts [C. T. 71].

On December 11, 1967, Leroy Herbert Ray was committed to the custody of the Attorney General for five years [C. T. 75]. Both defendants, Hollyfield and Hill, were also sentenced to five years' imprisonment on Count One, with their five-year sentences on the other Counts to run concurrently with the sentence on Count One, and with each other [C. T. 75].

Leroy Herbert Ray and James Hollyfield filed notices of appeal on December 12, 1967 [C. T. 78-79]. A notice of appeal was not filed on behalf of defendant Vincent Hall.

II

STATEMENT OF FACTS

During the spring of 1967, Leroy Ray and the co-conspirators planned a major scheme to steal mail matter from the United States mails and to use the banking information contained in the stolen mail to effect fraudulent withdrawals from banking institutions.

The manner in which the scheme operated followed a consistent pattern. A letter addressed to a bank or savings and loan association and containing either a passbook, account number, and speciman signatures, would be placed in the United States

mails by a depositor [2/] [R. T. 33-34, 49, 115, 130, 133-134]. The envelope would then be stolen from the mails [R. T. 260-261], the rifled envelope would on occasion be returned into the mails and found in another mail box or at the Terminal Annex Post Office [R. T. 445], and, lastly, the information would be used (1) either to provide a specimen name or signature for the forging of a stolen check [R. T. 369-370, 375-376], which would be cashed at a bank [R. T. 45, 47, 268], or (2) more frequently, to provide specimen signatures and the bank account numbers for fraudulent withdrawals from the account at the bank or savings and loan association [R. T. 28, 35, 52-55, 265-267].

Leroy Ray was instrumental in training runners to steal the mail from the boxes, forge specimen signatures, and enter the banks to cash the forged checks or make fraudulent withdrawals [R. T. 238-247]. One such runner was Jacqueline Rochelle Dunn.

Leroy Ray met Jacqueline Dunn in late February, 1967 [R. T. 236]. In a conversation held in a car traveling to Los Angeles International Airport, Ray explained to Miss Dunn some facets of the scheme of "working the banks" [R. T. 240]. She was to deposit an item in the bank and then take a larger sum of money out that was already on deposit [R. T. 240]. As Miss Dunn stated, "Leroy had said to me that there was nothing actually to be afraid of, that you go into the bank with the feeling that the money is yours" [R. T. 241].

2/ R. T. refers to Reporter's Transcript.

A short time later at the Parkway House, St. Louis, Missouri, Ray asked Miss Dunn to practice forging the signatures that would be used in fraudulent withdrawals [R. T. 245], and indicated that the account numbers "came from out of the boxes [R. T. 245].

An example of how the master scheme was put into effect can be seen from the incident involving the check of one June Banks [Gov. Ex. 1]. On April 1, 1967, John Banks mailed a check in the sum of $123.59, endorsed by his wife, June Banks [Gov. Ex. 1], at a post office box at Willoughby and Las Palmas in Los Angeles [R. T. 33-34]. The check was for deposit at the Bank of America, Whittier, California.

That very evening the letter and its contents were among numerous others stolen in a burglary of over ten mail boxes in Hollywood [R. T. 258]. Jacqueline Dunn was a passenger in an automobile which drove from mail box to mail box in Hollywood from which numerous items of mail were stolen [R. T. 255-259]. One Clarice Berryhill was the individual who physically removed the mail from the boxes [R. T. 256].

The mail boxes were all entered with the use of a United States mail key [R. T. 256-257]. It was on October 31, 1965 that 50 such master mail keys were stolen in a burglary of the La Tijera post office in Los Angeles [R. T. 18-20]. Each of these master keys would open over 8,000 corner mail boxes in the Los Angeles area [R. T. 21].

The mail stolen on the evening of April 1, 1967 was all

sorted at a location in Los Angeles and the contents of the letter mailed by Mr. Banks were among those chosen for a fraudulent attempt to obtain money from the bank [R. T. 259-261].

On April 5, 1967, after observing Clarice Berryhill in conversation with Leroy Ray, Jacqueline Dunn was driven by Clarice Berryhill to the Bank of America in Whittier where June Banks had her account [R. T. 262-263].

Part of the general scheme required false identifications, the most prominent being California driver's licenses. It was near the end of March, 1967 that Jacqueline Dunn was present in the apartment of Leroy Ray in Los Angeles and saw some of the paraphernalia used in making false California driver's licenses. These included numerous licenses themselves along with a rubber date stamp [Gov. Ex. 24-B], ink pads [Gov. Ex. 24, 24-A], and a United States quarter that was used to imitate the seal of the State of California on the reverse of the California driver's licenses [Gov. Ex. 24-A; R. T. 249-252]. In fact, Leroy Ray had actually made up a false driver's license for Miss Dunn shortly before that occasion [R. T. 251].

On this particular mission at the Bank of America, Whittier, however, no false identification was used. Instead, Jacqueline Dunn arrived at the bank and after practicing a specimen signature, handed the teller, Kathleen Rosseen, a piece of paper with the name "June Banks" on it [R. T. 264-267]. Miss Dunn, in addition, identified herself as June Banks [R. T. 266]. Unfortunately for Jacqueline Dunn, another teller working at the bank at the same

time happened to be the real June Banks [R. T. 36-38]. She resided in Hollywood, was employed at the Bank of America in Whittier, and happened to be banking by mail. The Whittier police were immediately summoned and Jacqueline Dunn's attempted withdrawal was unsuccessful [R. T. 38, 267].

Another example of how the scheme operated is clearly seen in the following events in April, 1967. On the morning of April 4, 1967, a Mrs. Nathan Lipschultz placed two letters on her mail box for pickup by the mail carrier [R. T. 48-49]. Each letter was addressed to the Southern California Savings and Loan Association, 9250 Wilshire Boulevard, Beverly Hills. One letter bore her return address and contained her passbook to her savings and loan account at the institution [R. T. 49]. The other letter belonged to the sister of Mrs. Lipschultz, a Mrs. Inez Wilson [R. T. 49]. This other letter bore the return address of Mrs. Wilson and contained her passbook to the same institution [R. T. 49]. A short time after placing the letters on the mail box, Mrs. Lipschultz observed that they were not there and found that the mailman had not been to her address to effect delivery [R. T. 50].

Exactly six days later on April 10, 1967, the sum of $10,000 was withdrawn from the account of Mrs. Lipschultz at the Southern California Savings and Loan Association [R. T. 52-55]. It was on April 12, 1967, only two days later, that an attempt was made to effect another $10,000 withdrawal from the association, this time from the account of Mrs. Inez Wilson [R. T. 69-72]. On this date, Leroy Ray drove defendant Carroll Ellen Nutter to that

institution, at which time she attempted a fraudulent withdrawal [R. T. 80]. This time, however, she was unsuccessful and left the area in an Oldsmobile driven by Leroy Ray [R. T. 97], and registered to him [Gov. Ex. 9].

The original mailing envelope [Gov. Ex. 4], and the passbook [Gov. Ex. 4-A], of the Lipschultz account were recovered incident to the arrest of defendant Vincent Hill on April 28, 1967, at 4800 August Street, Apartment 4, Los Angeles [R. T. 397-399]. Fingerprints of defendant Hill were found on the Lipschultz passbook [Gov. Ex 4-A]. In addition, a fictitious California driver's license in the name of Inez Wilson and bearing the photograph of Carroll Ellen Nutter were recovered incident to the arrest of Leroy Ray on April 28, 1967 [R. T. 436]. This is the very same fictitious license that Carroll Ellen Nutter had in her purse, but did not use when she attempted the fraudulent withdrawal [R. T. 582].

In addition to the two letters containing passbooks to the Southern California Savings and Loan, Mrs. Lipschultz also mailed a letter on April 4, 1967, to Dr. S. D. Daniels, containing her check No. 435, in the amount of $94.00 [R. T. 53-54] [Gov. Ex. 5]. The original check content was recovered incident to the arrest of Vincent Hill on April 28, 1967 [R. T. 436], and two prints of defendant Hill were found on that check [R. T. 151].

An example of the use of banking information for use in forging a stolen check is found in the incident involving Mrs. Carl Cotterell. On the evening of April 13, 1967, Mrs. Cotterell observed her son mail checks with signatures and account number

at a collection box at Fourth Avenue and Country Club Drive in Los Angeles [R. T. 40-41].

One day later, April 14, 1967, Jacqueline Dunn was driven by Leroy Ray to the vicinity of Crocker Citizens National Bank, Pico-Bronson Branch, Los Angeles [R. T. 268-270]. Ray gave Jacqueline Dunn a check dated April 14, 1967, in the sum of $289.50 [R. T. 267] [Gov. Ex. 3]. This was one of a series of checks that had been stolen in blank from the Neal Coffee Corporation, Los Angeles, on February 15, 1967 [R. T. 369-370]. This check bore the purported signature of Edith Cotterell [R. T. 41-42]. This was not her signature [R. T. 42], and Jacqueline Dunn was unsuccessful in attempting to cash this forged check at the Crocker Citizens Bank [R. T. 270-272].

Another instance of the use of stolen mail to provide names and signatures for stolen checks relates to the incident involving Mr. and Mrs. Walter Jesperson. On March 20, 1967, Mr. Jesperson mailed three letters in a collection box at Mansfield and Rosewood in Los Angeles [R. T. 133-136]. These were an envelope addressed to the Los Angeles Times [Gov. Ex. 13], containing his check No. 480, and an envelope addressed to Atlantic-Richfield Company, Los Angeles [Gov. Ex. 15], containing a check No. 481 [Gov. Ex. 14-A], and a statement of the amount due [Gov. Ex. 15-B], and an envelope to Allstate Credit Corporation [Gov. Ex. 16], containing a check No. 482 [Gov. Ex. 16-A], and a statement [Gov. Ex. 16-B].

All three rifled envelopes were recovered from a different

collection box located at Las Palmas and Willoughby on the morning of April 21, 1967 [R.T. 388-392, 445]. On the morning of April 29, 1967, check No. 480 [Gov. Ex. 14], which had been contained in the envelope addressed to the Los Angeles Times [Gov. Ex. 13], was recovered from the person of James Hollyfield incident to his arrest by the Los Angeles Police Department [R.T. 178]. Furthermore, James Hollyfield had on his person a check stolen in the burglary of the Fort Inn, Wilmington, California [R.T. 178] [Gov. Ex. 17]. On February 21, 1967, a substantial quantity of blank checks were stolen from the Fort Inn [R.T. 375-376]. The check that Hollyfield had on his person was now made out in the amount of $279.14, dated April 25, 1967, and made payable to the person whose mail had been stolen on March 20th, namely, Mr. Walter Jesperson [Gov. Ex. 17]. Mr. Jesperson, of course, had no business connection with the Fort Inn and had no knowledge of the insertion of his name as payee on the stolen check.

It is to be noted that an expert witness from the Scientific Investigation Detail of the Los Angeles Police Department testified that he compared the check protector imprint on this stolen check that was in Hollyfield's possession [Gov. Ex. 17], with the check protector imprint on the other stolen check that bore the endorsement of Edith Cotterell [Gov. Ex. 3], that defendant Ray had given Jacqueline Dunn to cash at Crocker Citizens Bank on April 14, 1967 [R.T. 267]. It was his opinion that both imprints on the stolen checks were in all probability made by the same check protector [R.T. 477-478].

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS

On August 29, 1967, Leroy Ray filed a motion to suppress all items seized incident to his arrest that occurred on April 28, 1967 [C. T. 16-20]. The Government filed an opposition on September 7, 1967 [C. T. 22-25], and on September 12, 1967, the court heard the motion and denied it without prejudice [C. T. 31].

The motion was again renewed on November 6, 1967, and was denied without prejudice [C. T. 56]. The following day, on November 7, 1967, Ray specified the items of evidence to which his motion to suppress was directed [C. T. 57].

The court then denied the motion to suppress, but reserved any final ruling until the Government attempted to offer the items into evidence [C. T. 57]. At this time, the court indicated to counsel that unless it were persuaded otherwise, it would grant the motion and exclude the evidence at the time of its attempted introduction [R. T. 209, lines 5 to 7].

On November 8, 1967, the Government requested the court for the first time to reconsider its intention to exclude the evidence, citing the decision of this Circuit in Ferganchick v. United States, 374 F. 2d 559 (9 Cir. 1967) [R. T. 127-128]. It was the Government's contention that even if the complaint on which the arrest of Ray was based was defective, it was still proper for the court to look,

independent of the complaint, to determine if the arresting officer had the requisite probable cause [R. T. 127].

Later the same day, the court indicated it had studied the Ferganchick case and stated, " . . . this case appears to me to be squarely in point," [R. T. 211, lines 21 and 22] and " . . . I am going to have to reverse myself from my previous announcement and follow this case . . . . " [R. T. 209, lines 1 and 2]. The matter was, however, put over until Monday, November 13th, for further argument on the motion [R. T. 211, lines 6, 7].

On November 13th, the Government filed additional points and authorities along with an affidavit of Postal Inspector J. C. Peterson, the affiant in the original complaint and the arresting officer of Ray. On the same date, a hearing was held on the issue and the court ruled that the items found by Inspector Peterson incident to the arrest of Ray could be admitted at the trial [C. T. 60]. The items were subsequently marked for identification and admitted [R. T. 515].

Ray specifies as error that the motion to suppress should have been granted. The argument of Ray at pages 23 to 26 appears to cover two points: First, the right of the trial judge to reconsider a pretrial ruling [App. Br. p. 23], and second, the propriety of the final ruling.

Turning to the first point, appellant states that:

> "The federal courts have generally held that the right to reconsider a ruling on a pre-trial motion is not unlimited. Where a second judge

sits in the same case he may not overrule the decision of another judge except in very exceptional circumstances." [App. Br. p. 23.]

Among the cases cited is United States v. Wheeler, 256 F. 2d 745 (3 Cir. 1950). In that case, the Circuit Court merely held that where an original judge had denied a motion to suppress evidence and had assigned the petition for rehearing on the motion to another judge, it was an abuse of discretion for the second judge to take testimony which was substantially of the same content as that at the original motion to suppress.

Appellant then stated that, "Even where the same judge sits in the case this rule has been applied," citing Douse v. United States, 359 F. 2d 1014 (D. C. Cir. 1966) [App. Br. 23].

The decision in Douse, however, is hardly authority for that proposition, for there, too, as in Wheeler, two judges were involved. Douse v. United States concerned a charge of violation of the narcotics laws in which one judge at a suppression hearing had denied a motion to suppress. Later at trial, with a different judge presiding, the testimony of an arresting officer appeared to differ from that at the motion to suppress. The defendant asked the court to reconsider the decision on the motion to suppress and requested permission to interrogate the officer in a hearing outside the presence of the jury. The trial judge denied the motion to reconsider, solely on the ground that the suppression judge had held a full and complete hearing. The Circuit Court merely held

that it was error for the trial judge not to reconsider the ruling on the motion in the light of the change of the arresting officer's testimony at trial, and remanded it to the trial court for a fresh determination of the suppression issue.

With the above mentioned cases as apparent authority, the appellant then argues that:

> "These cases develop an exception to the doctrine of finality when the defendant renews his objections at trial. There is no authority that the converse is also true. [App. Br. 23.]

Appellant thus appears to advance the very novel theory that a decision granting a motion to suppress made at a hearing prior to trial cannot be altered at trial, and that only if the motion is denied, and the defendant later renews his objection at trial, can the trial judge reverse himself. In fact, the appellant himself states:

> " . . . the court could not reverse its decision without additional evidence having been offered or exceptional circumstances occurring."
> [App. Br. 24.]

In response to this novel contention, it may be noted that nowhere does the record reflect that a final ruling granting the motion to suppress was ever made by the trial judge. To the contrary, the court merely indicated its strong intention to exclude

the evidence at the time of its introduction at trial on the basis that the complaint on which the arrest warrant was based was defective [R. T. 209, lines 5 to 7].

But even if a ruling had been made prior to trial, granting the motion to suppress, it would appear to be not only a novel but an absurd contention that a trial judge could not request additional authority on an issue, hear additional evidence, and then make a final ruling during trial to admit the evidence. That is precisely what was done in the instant case and hardly qualifies as error on the part of the trial judge.

Assuming, therefore, that it was proper to have considered the question of admissibility of the evidence again at the time of trial, it is necessary to examine at this point the factual issues and the law applicable to those facts.

On April 19, 1967, Postal Inspector J. C. Peterson obtained a complaint against Leroy Ray, charging that he, on April 12, 1967:

> " . . . unlawfully had in his possession the contents of a letter which had been stolen from an authorized depository for mail matter. The letter addressed to So. California Savings and Loan Association, 9250 Wilshire Blvd., Beverly Hills, California, and at said time and place the defendant well knew said contents of said letter to have been stolen."
> [App. Br., Ex. A.]

This was later the basis for overt act No. 3 in Count One of the Indictment [C. T. 2].

The probable cause in the complaint was written as follows:

> "The subject letter was placed out for carrier pickup and not received by the addressee. The contents of said letter was used in an attempt to withdraw funds from mailer's account at addressee firm. The subject and his car have been identified as the means of escape for the person attempting the withdrawal." [App. Br., Ex. A.]

It is conceded that based on the decision in Giordenello v. United States, 357 U.S. 480 (1957), the instant complaint was defective in that it failed to state from which sources the Postal Inspector had obtained the information.

But the law is clear that an arrest made under the authority of defective warrant may be justified by establishing the existence of probable cause for the arrest independent of the warrant.

Go-Bart v. United States, 282 U.S. 344 (1930);

United States v. Hall, 348 F. 2d 837, 841-842 (2 Cir. 1965), cert. denied 382 U.S. 997 (1965);

Bell v. United States, 371 F. 2d 35 (9 Cir. 1967);

Ferganchick v. United States, 374 F. 2d 559 (9 Cir. 1967).

In fact, this Honorable Court in Bell v. United States, supra, following and referring to United States v. Hall, supra, stated:

> "In that case there was a warrant which the Government conceded to be invalid. It argued, as it does in this case, that the arrest was nevertheless lawful because of the existence of the required reasonable grounds to believe that the arrested person had committed the crime. The defendant there urged that the fact that a warrant, though an invalid one, had been obtained conclusively demonstrated that there was sufficient time to obtain a warrant and, that being so, the arrest without a warrant was illegal.
>
> "The court in Hall declined to 'impose on the law of arrest a requirement thus far confined to the law of search and seizure.' Judge Friendly's opinion in Hall, at pages 841-842, cites and quotes from the pertinent judicial precedents and other writings and concludes that the arrest was lawful and that the admissions made by the defendant shortly after the arrest were admissible in evidence. We agree with the Hall decision and opinion and will not further discuss it here."
>
> Bell v. United States, supra, p. 37.

In the instant case, that is precisely the procedure that was employed. Inspector Peterson swore an affidavit that was considered by the court, in which he outlined the information he had prior to the arrest of Ray, and from which sources he had obtained it.

Inspector Peterson stated that he received the following information prior to the arrest of the appellant: That on April 4, 1967, Mrs. Nathan Lipschultz had placed two letters on her mail box for carrier pickup, both letters addressed to Southern California Savings and Loan Association, 9250 Wilshire Boulevard, Beverly Hills, California; that one letter bore her return address and contained her own passbook to her savings and loan account at that institution, and that the other letter bore the return address of her sister, Inez Wilson, and contained Mrs. Wilson's passbook to the same institution; that both these letters were never received by the addressee; that on April 10, 1967, an unauthorized $10,000 withdrawal was effected from the Lipschultz account at the savings institution by an unidentified individual; that on April 12, 1967, a female Caucasian made an attempted $10,000 withdrawal from the Inez Wilson account at the same institution, and that the teller, Barbara Fleer, had positively identified the individual attempting the fraudulent withdrawal as being Carroll Ellen Nutter; that this individual was known to Inspector Peterson as being involved in the conspiracy of mail thieves; that a parking attendant across the street from the savings institution, James Simmons, had positively identified the individual driving the getaway car as being Leroy Herbert Ray; that Ray was known to Inspector Peterson as an

individual who had furnished false identification on previous fraudulent withdrawals from banks; that another eye-witness, Vester Stevenson, had observed the license number of the automobile as being TPK 518; that Inspector Peterson received from the Department of Motor Vehicles the information that the license number of TPK 518 was registered to an automobile owned by Leroy Ray [C. T. 64-66].

The trial court, considering the testimony of Inspector Peterson, ruled finally that probable cause independent from the complaint existed for the arrest of appellant, and that the items seized could be admitted at trial [C. T. 60].

Probable cause exists if the facts and circumstances known to the officer would cause a reasonable, cautious and prudent man having the specialized knowledge of an enforcement officer to believe that a felony had been committed.

Carroll v. United States, 267 U.S. 132 (1925);

Brinegar v. United States, 338 U.S. 160 (1949);

Draper v. United States, 358 U.S. 307 (1959);

Henry v. United States, 361 U.S. 98 (1959);

Burk v. United States, 287 F.2d 117 (9 Cir. 1961), cert. denied 369 U.S. 841 (1961).

The trial court was clearly correct in its ruling that probable cause existed for the arrest of appellant Ray.

II

THE EVIDENCE SECURED IN CONNECTION WITH DEFENDANT HOLLYFIELD'S ARREST WAS VALIDLY SEIZED

Appellant argues that the evidence secured in connection with the arrest of co-defendant Hollyfield was inadmissible and should have been suppressed.

Appellant's contention in this regard is somewhat confusing due to a substantial variance between his second specification of error and the argument thereunder. The specification in his "Subject Index" states that there was error in not granting Hollyfield's motion to suppress evidence and that appellant was prejudiced by the use of this evidence. However, the argument under this specification deals exclusively with the issue of the "Standing of appellant to raise the issues" [Appellant's Brief p. 11-14]. There is no discussion therein regarding the validity of the seizure of the evidence in question.

Turning first to the issue of standing, it is clear that Ray only comes within the class of those "who claim prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else. Jones v. United States, 362 U.S. 257, 261 (1960).

The search to which Ray now refers was directly solely at Hollyfield; no evidence whatsoever was taken from Ray himself. Appellant Ray therefore lacks standing to challenge the search and seizure relative to Hollyfield. Diaz-Rosendo v. United States,

357 F. 2d 124 (1966), cert. denied 385 U. S. 856 (1966).

But even assuming that Ray has standing, the search and seizure relative to Hollyfield was valid. An examination of the record clearly reflects that no unlawful procedures whatsoever were employed by the arresting officers. The police officers' entry into Hollyfield's apartment was valid and consented to. Both arresting officers testified that they went to the Hollyfield residence in answer to complaints of noise from this apartment. They knocked on his door, Hollyfield opened it and, knowing why the police were there, "he told us to come in" [R. T. 177-78, 192-94, 228.] Thus, the facts present a situation where officers are invited onto the premises, having no intent to arrest Hollyfield or search the area. See Thompson v. United States, 382 F. 2d 390, 393 (9 Cir. 1967); United States v. Barone, 330 F. 2d 543 (2 Cir.), cert. denied 377 U. S. 1004 (1964); Davis v. United States, 327 F. 2d 301, 303 (9 Cir. 1964). The officers, as Hollyfield was aware, were responding to a complaint of noise and thus entered as part of their normal duties.

Whether the sworn testimony of the officers -- that their entry was consented to, under no circumstances of coercion, stealth, or duress -- is to be believed was a question of fact for the trial court. Redmon v. United States, 355 F. 2d 407, 411 (9 Cir. 1966); Davis v. United States, supra, at 304-05; United States v. Page, 302 F. 2d 81, 82-85 (9 Cir. 1962) (en banc). The determination of this fact is thus binding, unless so obviously mistaken as to be "clearly erroneous". United States v. Page,

supra, at 85. See also Nelson v. People, 346 F. 2d 73, 77 (9 Cir. 1965).

Once inside Hollyfield's apartment, it is clear that no "search" was conducted. There can hardly be doubt that once legally inside the premises, what police officers see in plain view is not to be deemed a discovery due to a "search". Ker v. California, 374 U.S. 23, 43 (1962) (brick of marihuana seen on scale in kitchen; no search); Davis v. United States, supra, (wastebasket containing marihuana seen within five feet of door; no search). See also United States v. Lefkowitz, 285 U.S. 452, 465 (1932); United States v. Lee, 274 U.S. 559 (1927); United States v. Barone, supra; People v. West, 144 Cal. App. 2d 214, 300 P. 2d 729 (1956).

And such rationale is not restricted to the immediate view of the officers at the doorway. Ker v. California, supra (evidence in kitchen through another doorway); United States v. Barone, supra (counterfeit bills floating in toilet in adjoining bathroom; no search); Davis v. United States, supra (marihuana found in waste basket in adjoining bathroom).

In the present case, the officers smelled the odor of what they determined to be marihuana upon entering the premises [R.T. 180, 198, 229-30]. Without moving, they saw the tell-tale "zig-zag" paper used to roll marihuana cigarettes [R.T. 182]. Unusually colored cigarette butts, characteristic of marihuana, were in an ashtry plainly visible in an adjoining room [R.T. 181-182]. One officer, taking only a few steps, picked up and examined

one of these butts, and determined it to be marihuana [R.T. 183]. Thus, applying the relevant case law, it is evident that the officers conducted no search prior to the arrest, yet "were not required to remain blind to the obvious". Davis, supra, at 305.

Furthermore, it is clear from the record that probable cause existed for the arrest of Hollyfield for narcotics violations. The arrest in this case was effected by Los Angeles police officers for violation of a California statute. The states may work out their own rules governing arrests, provided that these rules stay within the Fourth Amendment and within the rule that illegally seized evidence is inadmissible at trial. Beck v. Ohio, 379 U.S. 89, 92 (1964); Ker v. California, 374 U.S. 23, 37 (1963); United States v. DiRe, 332 U.S. 581, 589 (1948). The validity of this arrest is therefore to be determined by state law, within the bounds of the United States Constitution. Ker, supra, at 37; Wartson v. United States, ___F.2d ___ (9 Cir.), No. 21,830, August 21, 1968, Slip Op. at 4; Dagampat v. United States, 352 F.2d 245 (9 Cir.), cert. denied 383 U.S. 950 (1965); Lipton v. United States, 348 F.2d 591, 594 (9 Cir. 1965); Burk v. United States, 287 F.2d 117.

California Penal Code, §836, provides that:

> "A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:
>
> "1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

The test of reasonable cause for arrest has been stated to be whether there is:

"more evidence for than against, so that a man of ordinary care and prudence, knowing what the arresting officer knows, would be led to believe or conscientiously entertain a strong suspicion of the accused's guilt, although reserving some possibility for doubt."

People v. Murietta, 60 Cal.Rptr. 56, 57, 251 A.C.A. 1147, 1148 (1967).

See also People v. Dabney, 59 Cal.Rptr. 243, 250 A.C.A. 1078 (1967).

As stated by the United States Supreme Court:

"[P]robable cause [exists] . . . 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'"

Ker v. California, supra, at 35, quoting Brinegar

v. United States, 338 U.S. 160, 175-176 (1949);

Carroll v. United States, 267 U.S. 132, 162 (1925).

In the instant case, the facts relied upon for justifying the arrest were the odor of recently burnt marihuana, and the paper used and examination of the butts from such cigarettes.

The Supreme Court of the United States has noted that,

> " . . . We cannot sustain defendant's contention that odors [of narcotics] . . . cannot be evidence sufficient to constitute probable grounds for any search."

Johnson v. United States, supra, at 13;

and,

> "A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists . . . "

United States v. Ventresca, 380 U.S. 102, 111 (1965);

see also Rugendorf v. United States, 376 U.S. 528 (1964).

In the present case, the officers testified to training and long experience in marihuana detection [R.T. 181]. The case law supports the contention that the factual situation, viewed from the vantage of such experienced law enforcement officers, provided probable cause for arrest.

In People v. Lee, 260 A.C.A. 885 (1968), the police stopped a car for absence of a license plate. An officer leaned over to question the driver and detected what he determined to be marihuana smoke. Ordering defendant out of the car, he noted that defendant's pupils were dilated and his speech was slurred. These facts alone sufficed for probable cause for arrest for marihuana violations and justified search incident to arrest.

Similarly, in other cases, the odor of burning marihuana and the suspect's physical appearance, judged in light of the officers' training and experience, have consistently been held to meet the probable cause standard for arrest. People v. Layne, 235 Cal.App. 2d 188, 193, 45 Cal.Rptr. 110 (1965); People v. Jefferson, 230 Cal.App. 2d 151, 40 Cal.Rptr. 715 (1965); People v. Clifton, 169 Cal.App. 2d 617, 337 P. 2d 871 (1959).

In People v. Bock Leong Chew, 142 Cal.App. 2d 400, 298 P. 2d 118 (1956), police, in the building on another matter, detected what they thought to be opium when they were passing outside defendant's apartment. Defendant's wife admitted them. The subsequent search, which turned up opium, was deemed valid. See also People v. Chong Wing Louie, 149 Cal.App. 2d 167, 307 P. 2d 929 (1957).

The odor of burning marihuana emanating from parked cars and furtive motions of the occupants when approached, seen in light of police training and experience, have consistently been found to constitute probable cause for arrest, and subsequent search incident thereto. See, e.g., People v. Sullivan,

242 Cal. App. 2d 767, 51 Cal. Rptr. 778 (1966); People v. Langley, 182 Cal. App. 2d 89, 5 Cal. Rptr. 826 (1960); People v. Tisby, 180 Cal. App. 2d 574, 5 Cal. Rptr. 615 (1960).

In People v. Sandoval, 419 P. 2d 187, 54 Cal. Rptr. 123 (1966) (en banc), cert. denied 386 U. S. 948 (1967), the police had just arrested a woman with heroin in her possession leaving defendant's house. They knocked on the door; when the door was opened they detected a plastic bag lying in plain view on the floor inside. Their determination from outside the door that this bag contained narcotics was deemed sufficient probable cause for arrest and search of the occupants.

It is submitted that the evidence in plain view to the officers who were legally on the premises, justified their belief that since a felony had been committed and was being committed in their presence, probable cause existed to arrest the defendant, James Hollyfield.

Since the arrest was valid, the search of Hollyfield's person, incident to the arrest, was also valid even though it turned up evidence of a crime unrelated to the one prompting the arrest.

United States v. Rabinowitz, 339 U. S. 56 (1950);

Cotton v. United States, 371 F. 2d 385, 393-94 (9 Cir. 1967);

Taglavore v. United States, 291 F. 2d 262, 265 (9 Cir. 1961);

Charles v. United States, 278 F. 2d 386, 389 (9 Cir. 1960).

See also: Davis v. United States, supra;

United States v. Barone, supra.

III

A HEARING WAS CONDUCTED OUTSIDE THE PRESENCE OF THE JURY REGARDING DEFENDANT HOLLYFIELD'S MOTION TO SUPPRESS EVIDENCE, AND NO ERROR WAS COMMITTED BY NOT CONDUCTING A SECOND HEARING

Leroy Ray specifies error as follows:

"The court below errored [sic] in not holding a hearing outside the presence of the jury relative to the validity of the seized evidence from Hollyfield in violation of Article VI of U.S. Constitution."

[Appellant's Subject Index.]

This claim has no validity for the following reasons: (1) such a hearing was in fact held; (2) no appropriate motion was made during trial requiring a second hearing; and (3) the evidence complained of was not prejudicial to the interests of appellant Ray.

Turning first to the fact that a hearing was in reality held. On October 26, 1967, counsel for Hollyfield filed a "Notice of Motion and Motion to Dismiss Indictment or in the Alternative to Suppress the Evidence", and a supporting petition and points and

authorities [C. T. 37-43]. On November 6, 1967, a pretrial hearing was held with no jury present, and the court denied Hollyfield's motion to suppress the evidence or dismiss the indictment [C. T. 56]. Part of the evidence considered at this hearing consisted of a description by the arresting officer of the marihuana found in Hollyfield's apartment. This is shown by the affidavit of R. E. Stanton attached as part of appellee's "Opposition to Motion to Suppress" [C. T. 50-52].

Ray cites McNabb v. United States, 318 U. S. 332 (1943) as his sole support for his claim that "[i]t iw [sic] well settled that where a question as to the admissibility of evidence allegedly illegally obtained in property [sic] raised, the court must conduct a hearing outside of the presence of the jury." [App. Br. p. 14.]

This is an erroneous conclusion. As stated by the court in McNabb:

> "To determine the admissibility of the statements secured from the defendants . . . the trial court conducted a preliminary examination in the absence of the jury. After hearing the evidence . . . the court concluded that the statements were admissible." Footnote 5a, 338-9.

In actuality, the holding in McNabb was that the statements should have been ruled inadmissible and that it was prejudicial error to admit them into evidence. The court in McNabb was not concerned with the mechanics of the hearing. In the instant case, just as in

McNabb, a hearing was held outside the presence of the jury to determine the admissibility of evidence which the defendants sought to suppress.

It is fundamental, in considering this issue, to keep in mind that Ray does not challenge the admissibility of the evidence per se. Rather, Ray only questions the mechanics by which the evidence was admitted.

Turning next to the next issue, Ray is in error when he states, "the court refused to conduct a hearing outside the presence of the jury." [App. Br. p. 14.] A review of the reporter's transcript, pages 177-178, fails to reflect any request whatsoever by any defense counsel that the court hold a hearing outside the presence of the jury. Counsel for Hollyfield objected to the testimony offered and moved to strike same, and also inquired, "[d]oes your Honor want this matter before the jury or should this go on in their absence?" [R. T. 177]. The court resIpmded, "[i]t is all right just as it is," [R. T. 177], and defense counsel offered no further objection, exception or motion. Counsel did inquire into the court's opinion regarding the propriety of the testimony before the jury, but counsel did not indicate that he wanted a second hearing outside the presence of the jury.

Even assuming that the second hearing should have been held, Ray was not prejudiced by this omission. Ray claims that failure to hold this hearing " . . . placed in front of the jury extremely damaging testimony of the defendant's [Hollyfield's] alleged position [sic] of marijuana . . . " [App. Br. p. 14].

This claim is without merit for two reasons. First, the testimonial evidence in question was admissible in any event because it dealt directly with the circumstances surrounding the arrest of Hollyfield and the obtaining of items of stolen mail found on his person. Ray's citation of Thurman v. United States, 316 F. 2d 205 (9 Cir. 1963) is not persuasive because it dealt with the inadmissibility of leading questions concerning purported unrelated criminal acts not resulting in convictions. By contrast, the evidence questioned by Ray is directly related to the acquisition of evidence essential to the case at bar, and was therefore clearly admissible.

The second reason that Ray suffered no prejudice is that the marihuana evidence bore absolutely no relationship to him, even assuming, for the sake of argument, that this should not have been admitted. This evidence only concerned Hollyfield. A review of the testimony concerning the marihuana references fails to yield any indication that Ray was in any way involved [R. T. 177-186].

In fact, to insure that Ray was not associated with the marihuana by the jury, the trial judge made the following very explicit statement to the jury following the above cited testimony:

> " . . . certainly the jury knows that we are not trying the defendants here for any violation or any defendant for any violation of the marijuana or narcotics laws, we are not trying them for being bad men, we are trying them for specific violations which are charged in the indictment and it will be limited to that." [R. T. 186.]

IV

THE COURT PROPERLY INSTRUCTED THE JURY WITH REGARD TO APPELLANT'S FAILURE TO TESTIFY

Ray specifies as error the instruction given the jury regarding his failure to take the stand [App. Br. Subject Index].

The instruction given by the trial judge is as follows:

> "The law does not compel a defendant to take the witness stand and testify. In this case the defendant Ray has not done so. No presumption of guilt may be raised, and no inference of any kind may be drawn from the failure of a defendant to testify." [R. T. 737]

In terms of content, this has been upheld as a proper instruction. Coleman v. United States, 367 F. 2d 389 (9 Cir. 1966).

After a very brief mention of Griffin v. California, 380 U. S. 609 (1965), Ray further cites Bruno v. United States, 308 U. S. 287 (1939), for the proposition:

> ". . . that it was reversible error not to give a requested instruction that no presumption should be drawn from the fact that the defendant had not taken the stand to testify in his own behalf."
> [App. Br. p. 26]

The Bruno case is hardly in point in the fact situation of the instant case, which involves not the refusal to instruct as in

Bruno, but the giving of an instruction to which Ray now takes exception.

Ray argues that:

> "In the case before this court it was the request of the appellant RAY that no instruction be given whatsoever relative to his failure to take the stand to testify. (6 TR 768 - 769)." [App. Br. p. 26]

The record of trial, however, does not sustain this contention. Prior to the giving of instructions the court informed all defendants of what instructions were to be given [R. T. 117-119; 590]. The appellant made no objection whatsoever at this time. It was only later, after the instruction had been given, that an objection was made [R. T. 768].

But even assuming that the objection was timely, the law is clear that the instruction was properly given. Appellant in effect concedes this point, in citing Belcher v. United States, 5 F. 2d 45 (2 Cir. 1944). More recently the Circuit Court for the District of Columbia held specifically that it was not error to give such an instruction even if the defendant requests that it be withheld. Lyons v. United States, 284 F. 2d 237 (D. C. Cir. 1960).

It is, therefore, clear that the instruction was proper in terms of content, and was correctly given to the jury in the instant case.

V

THE QUESTIONS AND COMMENTS BY THE TRIAL JUDGE WERE PROPER AND WITHIN HIS SOUND DISCRETION

The court in Fletcher v. United States, 313 F. 2d 137 (9 Cir. 1963), cert. denied 374 U. S. 812 (1963), at p. 139 concluded that: "It is within the province of a federal trial judge to interrogate witnesses and also to comment on their testimony if he so desires." The court also set forth the basic proposition that "(a) federal trial judge . . . is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies." See also United States v. Wade, 364 F. 2d 231 (6 Cir. 1966). The record of trial in the instant case clearly reflects that the trial judge acted well within the range of his discretion in his questions and limited comments.

Appellant supports his general claim of error by reference to Bollenbach v. United States, 326 U. S. 607 (1947), and Wilson v. United States, 250 F. 2d 157 (2 Cir. 1957). An examination of the cases reveals no real relevance to the instant case. In Bollenbach, supra, prejudicial error took the form of an incorrect instruction. The court stated, inter alia, at page 613, that the trial judge "was not even 'cursorily' accurate. He was simply wrong." In Wilson, supra, the reversal was due to the application of an erroneous standard of law by the trial judge. In Ah Kee Eng, supra, the court set forth three reversible errors, one of which was based upon the

serious prejudicial nature of the trial judge's treatment of defense counsel throughout the trial. As discussed below, the trial judge in the case at bar in no way could be said to have mistreated counsel for appellant.

Regarding questions, the trial judge clearly has the right to question witnesses. As stated in Baker v. United States, 357 F. 2d 11, 14 (5 Cir. 1966): "The function of the trial judge in aid of truth and in furtherance of justice to question witnesses . . . is well recognized in the jurisprudence of this country." It is indeed true that the trial judge must be careful to maintain an attitude of impartiality and to guard against giving the jury the impression that he believes in the guilt of the defendant. United States v. Hill, 357 F. 2d 11 (5 Cir. 1966). None of the questioning by the trial judge, however, could be said to have violated these cautions.

A review of the testimony of witness Dunn as reproduced in the reporter's transcript, pages 268 through 279, fails to lend any support to appellant's claim that the trial judge's questions were "leading and suggestive." [App. Br. p. 17]. The trial judge pointed out that this witness was "obviously under some emotional strain . . .", and showed "reticence" and "reluctance" while being questioned (R. T. 282). Under such circumstances, it is not at all improper for the trial judge to question the witness.

The decision in Ward v. United States, 353 F. 2d 156, 157 (5 Cir. 1965) is directly in point. There the court stated:

> "The first witness for the Government . . . appeared to be reluctant and somewhat vague in his

answers. The trial judge interrogated this witness for the rather obvious purpose of avoiding undue delay and to clarify the testimony. We are unable to conclude that any unfavorable impression was conveyed to the jury . . . ."

For the same reasons, appellee contends that the trial judge acted properly in his questions and rulings during the testimony of witness Dunn as set forth in the reporter's transcript, pages 242-321. Nothing contained therein lends support for appellant's conclusion that the judge conveyed an impression of confidence in her testimony to the jury [App. Br. p. 15].

Finally, appellant is concerned with the question "(d)id he say anything about the method to be used for . . ." asked witness Dunn by the trial judge (R. T. 246). The judge agreed that this was leading and, prior to any response by the witness, he withdrew the question and asked instead, "(w)as there anything said about the use of these numbers, account numbers?" [R. T. 246]. Certainly the trial judge acted correctly in withdrawing and rephrasing the original question, and no error was committed.

During the cross examination of witness Dunn by counsel for appellant the trial judge asked the witness to clarify the meaning which she attached to the term "discussed" [R. T. 291]. Appellant claims that this questioning indicates "an apparent willingness by the court to preclude the rigorous, exacting and searching nature of cross-examination . . . " [App. Br. at 19].

The vacuity of this claim is readily apparent from a review of the exacting cross-examination actually conducted by counsel for appellant with regard to the same "discussion" [R. T. 291-295].

Regarding comments of the trial judge, it is within the discretion of the trial judge to comment fairly on the evidence. Fletcher v. United States, supra, United States v. England, 347 F. 2d 425 (7 Cir. 1965). As discussed below, the comments questioned by appellant were not improper. The instant case is far removed from United States v. Porter, 386 F. 2d 270 (6 Cir. 1967) which was cited by appellant. In that case, the trial judge practically gave a closing argument to the jury, and also made extensive comments during the trial.

The trial judge is free to comment that the trial is "a search for the truth" [R. T. 246]. Appellant sees this as an admonishment [App. Br. p. 16]. Even if it is so categorized, such comments are clearly allowable under Paddock v. United States, 327 F. 2d 971 (9 Cir. 1963). See also Johnson v. United States, 356 F. 2d 680 (8 Cir. 1966). These authorities also support the propriety of the trial judge's comment that "the law permits the barest interrogatories as to whether or not a person has ever been convicted of a felony, but it also throws somewhat of a cloak around the witness and prevents them (sic) from public shame and disgrace." [R. T. 296]. According to the appellant "(i)t seems fair to say that the trial judge's reproach of counsel told each juror that appellant's lawyer was not only acting outside legal limits, but was trying to hold witness Dunn up to 'public shame and disgrace.' " [App. Br. p. 20].

It is obvious that the comment in question was well within the discretion of the trial judge in addition to being a correct paraphrasing of applicable legal principles.

Turning to another area, after several pauses of indeterminate length in her responses to questions posed by counsel for appellant, the witness Dunn was instructed by the trial judge to answer "in substance" and that "very few people remember exactly and precisely what they say." [R. T. 300]. This followed the question "(n)ow what I want to know is what did you say to Mr. Peterson?" [R. T. 300]. The fact that this witness did have recall problems is indicated by her later answer "(n)o, I am just trying to think back. So many things have happened. I can't remember everything." [R. T. 327]. Actually, it appears that the trial judge was attempting to aid counsel for appellant in obtaining answers. Certainly this would hardly constitute prejudicial error. See United States v. Birmbaum, 373 F. 2d 250 (2 Cir. 1967).

Regarding the statement of the judge relative to the existence of a conspiracy, on Tuesday, November 14, 1967, the fourth day of trial, codefendant Deborah Saundra Karish testified on behalf of the Government. Shortly after beginning, the following took place between counsel for Hollyfield and the Court:

> "MR. MILLER: . . . Your Honor, I would like an instruction at this time on behalf of the defendant Hollyfield, I made it prior to the other witnesses, this woman testified she only recognized one defendant, any admissions, confessions or

extrajudicial context which attempts to reflect prejudicially to Mr. Hill is not to be prejudicial to my client Mr. Hollyfield. I would like the jury to be so instructed, that that testimony should not be applicable to Mr. Hill.

"THE COURT: No, I won't do that. I think there is sufficient in the record at this time for a reasonable person to conclude that there was a conspiracy, and after there is a conspiracy at the appropriate time the jury will be instructed at length about the applicability of statements of one co-conspirator against another." [R. T. 349-350]

First, appellant is precluded from raising this issue on appeal because no objection was offered at trial with regard to this comment. As stated in Gilbert v. United States, 307 F. 2d 322 (9 Cir. 1962), cert. denied 372 U.S. 969, at 325: "Failure to make objection to evidence either before or at trial precludes consideration of objections thereto on appeal unless good cause for such failure is shown." Appellant's failure to preserve the record is not excused by his citation of Bursten v. United States, 395 F. 2d 976 (5 Cir. 1968) because in that case the trial judge clearly abused his discretion and deprived the defendant of a fair trial. The court cited the following examples of prejudicial comments at page 983: " 'If he doesn't prove it, I hope the jury will hold it against him . . .' 'Yes, Mr. Booth, now get back to your case, if

you have a case.' " Comments of this nature are clearly distinguishable from those offered by the trial judge in the case at bar. It is quite apparent that the trial judge was not stating that there was, in his estimation, any guilt on the part of this defendant. Rather, this was a routine ruling on the admissibility of evidence. Further, the comment was in response to a request of defense counsel.

Second, in the event this issue is properly on appeal, this comment was well within the wide scope of discretion allowed federal trial judges. Fletcher v. United States, supra and e. g., Thurmond v. United States, 361 F. 2d 537 (D. C. Cir. 1966), Franano v. United States, 310 F. 2d 533 (8 Cir. 1962), cert. denied 373 U. S. 940 (1962).

Finally, any doubt the jury might have had regarding this comment was completely erased by the extensive instructions given to the jury regarding the nature of conspiracy and the role of the jury as sole judge of the facts. In this regard, the following instructions were given:

> "In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by the evidence in the case as to his own conduct, what he himself wilfully said or did.

"Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements there after knowingly made and the acts there after knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member. . . .

"In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully became a member of the conspiracy.

"If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and that the accused willfully became a member of the conspiracy either at the inception or beginning of the plan or scheme, or afterwards, and that thereafter one or more of the conspirators knowingly committed, in furtherance of some object or purpose of the conspiracy, one or more of the overt acts charged, then the success or failure of the conspiracy to accomplish the common object or purpose is

immaterial." [R. T. 752, 753]

* * * * *

"The law of the United States permits the Judge to comment to the jury on the evidence in the case. Such comments are only expressions of the Judge's opinion as to the facts, and the jury may disregard them entirely, since you as jurors are the sole judges of the facts in this case." [R. T. 762]

* * * * *

". . . Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts." [R. T. 764]

Counsel for appellant not only failed to object to any of these instructions, but in addition, he failed to offer any additional instructions of his own. By this dual inaction counsel for appellant tacitly admitted that the instructions as given were sufficient. Appellant cannot make his initial challenge of the instructions in his appeal. White v. United States, 394 F. 2d 49 (9 Cir. 1968), Pratti v. United States, 389 F. 2d 660 (9 Cir. 1968).

VI

THE TRIAL JUDGE APPROPRIATELY DEFINED THE BOUNDARIES OF CROSS-EXAMINATION DURING THE TESTIMONY OF JACQUELINE ROCHELLE DUNN

Ray questions the validity of several of the trial judge's rulings made during counsel for appellant's cross-examination of Jackqueline Rochelle Dunn [App. Br. 7-11]. A review of the record of trial clearly reflects, however, that each of these rulings was well within the trial judge's broad discretionary power to control the scope of cross-examination.

There can be no doubt that the trial judge is invested with extensive discretionary powers regarding the scope of cross-examination. Generally speaking, " . . . the conduct of a criminal trial is a matter within the discretion of the court . . . and such discretion will not be disturbed in the absence of a clear showing of abuse." [citing cases], United States v. Wade, 364 F. 2d 931, 936 (6 Cir. 1966). Dealing specifically with the content of cross-examination, the court in Hendrix v. United States, 327 F. 2d 971, 976 (5 Cir. 1964), sets forth the traditional rule that " . . . the scope of cross-examination is left largely in the discretion of the trial court. In the absence of an abuse of discretion, the trial court's ruling will be upheld. . . ." [citing cases]

Ray cites Dixon v. United States, 333 F. 2d 348 (5 Cir. 1964), for the proposition that the trial judge cannot begin to exercise his discretion over the scope of cross-examination until after a party

has an opportunity to cross-examine [App. Br. 8]. This may be a valid proposition, but it is important to point out that in Dixon, unlike the instant case, defense counsel was not allowed to proceed with any cross-examination whatsoever following the direct examination of a witness. Dixon has little relevance to the instant case wherein counsel for appellant subjected witness Dunn to a lengthy and detailed cross-examination [R. T. 289-316].

Ray asserts that the trial court unduly restricted cross-examination of witness Dunn concerning her possible interest in testifying. First, Ray is foreclosed from pursuing this inquiry because he failed to bring the alleged error to the attention of the trial court. As set forth in three decisions of this Court, Gilbert v. United States, 307 F. 2d 322, 326 (9 Cir. 1962), cert. denied 372 U.S. 969 (1962), Hill v. United States, 261 F. 2d 483, 489 (9 Cir. 1958), and White v. United States, 394 F. 2d 49, (9 Cir. 1968), an alleged error must be brought to the attention of the trial court as a prerequisite to Appellate review.

When counsel for appellant asked witness Dunn: "You don't expect to gain any favor or reward by virtue of what you said in your direct examination about Mr. Ray, do you?", the court ruled that the question had previously been asked and answered in the negative [R. T. 308]. After an explanation of this ruling, counsel for appellant in no way indicated to the trial court that he thought that the ruling was in error [See R. T. 309].

Second, even if this issue is properly before the appellate court, inquiry into witness Dunn's interest in testifying was

certainly not unduly restricted. The only ruling questioned by Ray in this regard is that set forth above concerning the question which was "asked and answered" [R. T. 308]. Clearly this was not a restrictive ruling, since both the question and answer became part of the trial record, available to the jury for its consideration. This ruling in no way foreclosed counsel for appellant from pursuing this issue further through the use of other questions and avenues of approach not previously utilized. In fact, appellant's counsel did indeed pursue this issue by questioning the witness in considerable detail about conversations held with Government personnel prior to the trial in this case [R. T. 291-311; 321-335].

Even if it could be said that the trial court did in fact limit inquiry into witness Dunn's interest in testifying, such limitation was clearly not an abuse of discretion. This is so because the jury was very adequately appraised of the factors which might have influenced witness Dunn's interest in testifying. For example, the jury was made aware of the facts that witness Dunn was listed as a co-defencant in the indictment concerning this case [R. T. 234-235], and that action against this witness was still pending [R. T. 235]. The jury was informed of the fact that the witness might be testifying to aid herself when she was asked, "Miss Dunn, are you expecting to gain some favor by coming here testifying --," [R. T. 239], and she answered "No, I am not." [R. T. 239]. The fact that this witness had several conversations with Government personnel prior to the trial in the instant case was brought to the attention of the jury [R. T. 291-311; 321-335].

Finally, counsel for appellant very ably and lucidly attacked witness Dunn's credibility in his closing argument to the jury:

"Now the other so-called direct evidence is from Jacqueline Rochelle Dunn. She has not been brought to trial by the Government of the United States although she has been indicted. Would she have a motive? When I would ask her a question, a most simple question, it would take her one, two or more minutes. Do you know what that means? She has got to say something to destroy Leroy Ray and protect herself. She wants to ingratiate herself with Mr. Nobles and other representatives of the Government so that whenever she comes to trial, if at all, they will remember her cooperation and go easy on her and do something for her.

"I ask you, is she biased? When Mr. Nobles would ask her a question that tended to incriminate Mr. Ray her answer was instantaneous, the great hestiancy was not there, but when we questioned her she had to formulate her thoughts.

"I can appreciate when you listen to her, her hesitancy, you may read many things into it, but I suggest the thing that existed there was the fact that she hoped to gain favor and perhaps heap some ridicule or scorn upon Mr. Ray for whatever reason she had." [R. T. 714, 715]

It is clear, therefore, that any limitation of inquiry into witness Dunn's interest in testifying in no way impaired counsel for appellant in his campaign to cast doubt upon the credibility of this wintess' testimony. In a similar case, Johnson v. United States, 356 F. 2d 680, 683 (8 Cir. 1966), the court held:

> "A review of the entire cross-examination on the case in chief and in rebuttal discloses that appellant's counsel brought out before the jury the circumstances of his arrest . . . and was permitted adequately to show to the jury that this witness may have been influenced by the fact that he was not prosecuted by the Government . . . We find no prejudicial error in the court's cutting off the cross-examination of Vaughn and sustaining an objection at the time it did."

Ray cites several cases to support his claim that the trial court unduly restricted the scope of cross-examination during the testimony of witness Dunn. An examination of each of these cases, however, fails to reveal any relevance to the issues in this appeal.

Ray cites Grant v. United States, 368 F. 2d 658 (5 Cir. 1966), wherein the appellate court ruled that it was prejudicial error for the trial court to prevent defense counsel from asking a witness about possible discussions held prior to entry of a guilty plea. This case is indeed inapplicable to the facts of the instant case wherein appellant's counsel was allowed to conduct a searching

inquiry into the nature and content of various discussions involving witness Dunn and Government personnel prior to trial [R. T. 291-311; 321-335].

The court in Beaudine v. United States, 368 F. 2d 417 (5 Cir. 1966), found reversible error due to the cumulative effect of restrictive rulings concerning foreclosing inquiry into former felony convictions and inquiry into a previous refusal of the witness to give a statement unless he was paid $500. A review of the record in the instant case reveals no such restrictive rulings as in Beaudine. Counsel for appellant was allowed inquiry into witness Dunn's possible previous felony convictions [R. T. and there is no indication that he was denied inquiry into any similar possibility of bribery. It is important to note that the court in Beaudine, supra, concluded: "Neither of the two incidents expressly complained of here would alone justify reversal. . . ." (at p. 424) In the instant case, the record fails to reveal even one such incident which, standing alone, would be prejudicial error under Beaudine, supra.

Farkas v. United States, 2 F. 2d 644 (6 Cir. 1924), as cited by appellant, is not persuasive. There the trial judge not only limited inquiry into motive or bias, but also refused to give an instruction in this area. In addition, the judge also expressly instructed counsel not even to argue before the jury concerning the effect of an upcoming sentencing on the witness' motive for testifying. In the case at bar, Ray offered no instructions concerning this issue, and, as quoted above, was permitted

extensive argument regarding motive and bias.

In Meeks v. United States, 163 F. 2d 598 (9 Cir. 1947), one of the four grounds for reversal was based on the trial court's arbitrary disallowance of any inquiry into the witness' motive or reason for testifying. As indicated above, counsel for appellant made extensive inquiry and comment concerning witness Dunn's interest in testifying. The other three grounds for reversal in Meeks, supra, are in no way relevant to the issues presented by Ray.

Ray's citation of Napue v. Illinois, 360 U.S. 264 (1959), is not in point whatsoever because that case was concerned with the knowing use of false testimony by the State. The court concluded: "Our evaluation of the record . . . compels us to hold that the false testimony used by the State . . . may have had an effect on the outcome of the trial." (at p. 272) In the instant case, there is no similar claim.

In Alford v. United States, 282 U.S. 697 (1931), the court held it to be prejudicial error to sustain objections to the question "Where do you live," as being immaterial. In the instant case the record reflects that witness Dunn was asked by counsel for appellant, "Were you a resident of Los Angeles County all of your life?", and she replied "Yes." [R. T. 290].

The court in Gordon v. United States, 344 U.S. 414 (1952), found reversible error based on a failure to allow the use of conflicting written statements and a transcript of the sentencing judge's admonishments to the witness in the trial of an accomplice.

Ray has not raised any similar issues in the instant case.

Turning to another point, appellant next questions the propriety of the trial judge's ruling that the question "What is the business of occupation of Mr. Dunn?", was objectionable [R. T. 289]. First, Ray is precluded from raising this issue for the first time on appeal since no objection was offered at trial. Hill v. United States, supra; Gilbert v. United States, supra.

Even if this issue has been preserved for appeal, the trial judge's ruling was well within the scope of his discretionary power to control the scope of cross-examination. Hendrix v. United States, supra. Counsel for appellant never attempted to support the relevancy of this inquiry; and no authority has been cited to indicate that the ruling was in fact improper.

Ray claims that the trial judge should not have limited inquiry into the possible existence of other indictments and or bail releases with respect to witness Dunn. Clearly, the trial judge's foreclosure of these inquiries was proper. As stated by this Court in Thurman v. United States, 316 F. 2d 205, 206 (9 Cir. 1963), "It was error to suggest by leading questions on cross-examination of appellant that he had participated in specific acts of criminal conduct, not resulting in convictions, other than those with which he was charged. The questions could not be justified as impeachment; 'only a conviction . . . may be inquired about to undermine the trustworthiness of a witness.' " [Quoting Michelson v. United States, 335 U.S. 469, 482 (1948)]. Ray went beyond the scope of permissible cross-examination when he asked witness Dunn about

the possibility that she was out on bail in other cases [R. T. 290], or under indictment in an unrelated case [R. T. 296].

Counsel for appellant was, nevertheless, allowed to inquire about possible past felony convictions. On page 312 of the Reporter's Transcript, he asked witness Dunn: "You yourself haven't suffered a conviction of a felony, have you Mrs. Dunn?", and she replied "No, I haven't." [R. T. 313]. Counsel for appellant was in no way restricted from inquiring into witness Dunn's criminal record through the use of acceptable questions concerning her past convictions. In addition, the jury was made aware of the fact that witness Dunn was under indictment in this case and that she was out on bail.

Ray further asserts that the trial court unfairly limited inquiry into witness Dunn's state of mind. Counsel for appellant asked this witness: "You say you changed your mind about this case when you telephoned Mr. Peterson. How many times have you changed your mind with respect to this case?" The trial court sustained an objection to this question on the grounds that it was vague and indefinite [R. T. 303].

Although no objection was made at trial and even if this issue is properly before this Court, Ray cannot assert prejudicial error since there is absolutely nothing in the record to indicate that counsel for appellant was in any restrained from making further similar inquiries. The phrasing of the question was objected to, not the subject matter covered by the question. This inquiry could have been easily re-phrased had counsel for appellant

desired to pursue this avenue of questioning.

Ray is concerned with a possible inconsistency in witness Dunn's testimony and the purported inability of counsel for appellant to adequately explore this area [App. Br. 10]. The possible inconsistency raised by Ray touches the question of whether or not witness Dunn was under indictment before she decided to testify on behalf of the Government. To clarify this issue, counsel for appellant asked that the record be read from the previous day concerning witness Dunn's relevant testimony. The trial judge ruled that this would be improper and stated: "I think the jury is going to have to depend on their own recollection in that respect. As I recall, her testimony was that after she was indicted that she telephoned Mr. Peterson." [R. T. 312].

Ray fails to present any authority supporting his claim that the trial judge was required to have the record re-read. If counsel for appellant was really concerned about the prior testimony, he was free to secure a copy of the relevant portions of the transcript for use in further cross-examination. Following the witness' testimony, for the second time, regarding the sequence of indictment and her decision to testify, the trial was continued from Thursday, November 9, 1967, to Tuesday, November 14, 1967. Certainly this afforded counsel for appellant sufficient time to obtain a copy of the questioned testimony. As pointed out by the trial judge on the following Tuesday: "You are retained counsel and you can have the reporter write up whatever portions of the testimony you want at the rates which the Government fixes for him

to receive if you think you need that in your cross-examination or in your summation to the jury." [R. T. 344].

Finally, as pointed out in United States v. Kahaner, 317 F. 2d 459, 485 (2 Cir. 1963), cert. denied 375 U. S. 836 (1963): "Absolute perfection in trials will not be attained so long as human beings conduct them. . . ."

Ray also questions the sufficiency of the instructions given concerning bias or prejudice of witnesses. Although no objection was made at trial, and even assuming this issue is properly raised, it is clear that no error exists since the instructions given were both proper and sufficient. Ray is only concerned with the sufficiency of these instructions; he does not challenge their propeiety. Ray is in error when he states that the relevant instructions ". . . were limited to a single sentence. . . ." The record will clearly reflect that the instructions concerning bias and prejudice are set forth at length on pages 735, 736 and 742 of the Reporter's Transcript.

Lastly, there is nothing in the record of this case to indicate that counsel for appellant offered any additional instructions in an effort to correct the purported deficiency.

In conclusion, it is clear that the boundaries of cross-examination were appropriately defined during the testimony of witness Dunn, that the instructions concerning bias and prejudice were proper and sufficient, and that the trial judge exercising his discretion, was indeed a fair magistrate dealing impartially and justly with concededly a difficult witness.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

ERIC A. NOBLES
Assistant U. S. Attorney

Attorneys for Appellee
United States of America